SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC 2002-000356 12/02/2002

LC 2002-000357

HONORABLE MICHAEL D. JONES

CLERK OF THE COURT
P. M. Espinoza
Deputy

FILED:_____

STATE OF ARIZONA ERIC SPEELMON

v.

KEITH LANE CARTER THOMAS M SHAW

MESA CITY COURT
REMAND DESK CR-CCC

MINUTE ENTRY

MESA CITY COURT / **LC 2002-000356**

Cit. No. #2002026846

Charge: CT I: THREATENING OR INTIMIDATING, C1 Misdemeanor
CT II: INTERFERING WITH JUDICIAL PROCEEDINGS, C1 Misdemeanor

DOB: 10/24/73; 10/24/63

DOC: 02/22/02

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MESA CITY COURT / **LC 2002-000357**

Cit. No. #2002017566

Charge: CT I: THREATENING OR INTIMIDATING, C1 Misdemeanor
CT II: THREATENING OR INTIMIDATING, C1 Misdemeanor

DOB: 10/24/73; 10/24/63

DOC: 02/22/02

This Court has jurisdiction of these separate criminal appeals pursuant to the Arizona Constitution, Article VI, Section 16, and A.R.S. Section 12-124(A). In the interests of clarity, this Court will issue one opinion dealing with both cases, as counsel have each filed one memorandum. This case has been under advisement and the Court has considered and reviewed the record of the proceedings from the Mesa City Court and the memoranda submitted by the parties.

**1. Facts**

The Appellant was a patient at Desert Vista Hospital, a mental health and behavioral resource center. On February 5th, the Appellant spoke with Michelle Richter, a psychiatric social worker.[1] During that conversation, the Appellant threatened to kill his wife, permanently disable her boyfriend and hurt and kill his wife's father.[2] Michelle Richter notified Heather Carter, the wife, of these threats.[3]

On February 6, the Mesa police were called and Detective Chuck Lines visited the Appellant at Desert Vista Hospital.[4] Detectives Lines and Bina met with the Appellant in a private room at the hospital. Det. Lines identified himself to Appellant and explained that he was there to speak with him about some of the statements that were alleged to have been made. He told the Appellant that he was not required to talk with him and that he could leave at any time. He told the Appellant that he did not have to answer any questions and the he was not under arrest.[5] Det. Lines or Bina began questioning and did not read Carter his Miranda rights.[6] The Appellant agreed to talk with him and admitted that he threatened to kill his wife, his wife's father, and her boyfriend.[7] He stated that he would shoot the boyfriend in the balls and then the back. When the Detectives asked how he planned on killing his wife, the Appellant, replied, "no comment."[8]

An order of protection had been served on the Appellant on December 12, 2001, which ordered that he have no contact with his wife, Heather Carter.[9] On February 22, 2002, the

[1] R.T. of June 6 & 19 at p. 93:10-12; at p. 97:18-19.
[2] R.T. p. 94:8-15.
[3] R.T. p. 102: 9.
[4] R.T. p. 46: 9-16.
[5] R.T. p.49, 23-24, p. 50:1-7.
[6] R.T. 50, 8-9.
[7] R.T. p. 116:6-15.
[8] R.T. p. 117:9-11.
[9] State's exhibit 1 at trial.

Appellant made a telephone call to Heather Carter.[10] During that phone call, Heather Carter told the Appellant that she had heard he was planning on killing her. He replied, "that's the plan."[11]

On February 25, 2002, Detective Lines visited the Appellant again at the hospital under similar conditions as the first visit.[12] Again, Detective Lines asked the Appellant if he had called Heather Carter on February 22 and the Appellant replied that he had. When asked if he was violating the order of protection by calling her, he stated he knew he was violating the order.[13] Detective Lines asked if the drugs the Appellant was taking made him do these things. The Appellant replied that he called her because he wanted to, the drugs didn't make him do anything.[14]

Subsequently, two trials were held. The first dealt with the February 5, incident of threats and violating a court order. The second trial for the February 22 incident of threats and violating a court order. In a pretrial motion, the Appellant sought to prevent Detective Lines from testifying as to the Appellant's admissions due to Miranda violations and voluntariness of the admissions. The trial court ruled against the Appellant and allowed Detective Lines to testify to the Appellant's admissions. Appellant also sought to prevent Michelle Richter from testifying based upon the privilege contained in A.R.S. § 32-3283.

The Appellant raises five issues on appeal. First, the Appellant argues that the trial court erred by admitting the testimony of Michelle Richter. Second, the Appellant claims that the trial court erred by admitting the testimony of Detective Lines that was gained in violation of Miranda[15]. Third, the Appellant claims that A.R.S. Section 13-1202(A)(1) is unconstitutionally overbroad. Fourth, the Appellant claims that there was insufficient evidence to charge him with a new threat on February 22, when he spoke to Heather Carter. Fifth, the Appellant claims that there was insufficient evidence to convict him on the interference with judicial proceedings charge.

**2. Standard of Review**

Appellants raise a number of issues of constitutional dimension and statutory construction. In matters of statutory interpretation, the standard of review is *de novo.*[16] However, the appellate court does not reweigh the evidence.[17] Instead, the evidence is reviewed

[10] R.T. p. 152: 8-9.
[11] R.T. p. 152:1-2.
[12] R.T. p. 161, 16; p. 162:14-17.
[13] R.T. p. 163:20-23.
[14] R.T. p. 164:6-8.
[15] Miranda v. Arizona, 384 U.S 436, 86 S.Ct. 1602 (1966).
[16] In re: Kyle M., _____ Ariz. ____, 27 P.3d 804, 805 (App. 2001). See also, *State v. Jensen*, 193 Ariz. 105, 970 P.2d 937 (App.1998)
[17] Id.

in a light most favorable to affirming the lower court's ruling.[18] Appellate courts must also review the constitutionality of a statute *de novo.*[19]

Appellant also challenges the sufficiency of the evidence to support the judgment. When reviewing the sufficiency of the evidence, an appellate court must not re-weigh the evidence to determine if it would reach the same conclusion as the original trier of fact.[20] All evidence will be viewed in a light most favorable to sustaining a judgment and all reasonable inferences will be resolved against the Appellant.[21] If conflicts in evidence exist, the appellate court must resolve such conflicts in favor of sustaining the verdict against the Appellant.[22] An appellate court shall afford great weight to the trial court's assessment of witnesses' credibility and should not reverse the trial court's weighing of evidence absent clear error.[23] When the sufficiency of evidence to support a judgment is questioned on appeal, an appellate court will examine the record only to determine whether substantial evidence exists to support the action of the lower court.[24] The Arizona Supreme Court has explained in *State v. Tison*[25] that "substantial evidence" means:

> More than a scintilla and is such proof as a reasonable mind would employ to support the conclusion reached. It is of a character which would convince an unprejudiced thinking mind of the truth of the fact to which the evidence is directed. If reasonable men may fairly differ as to whether certain evidence establishes a fact in issue, then such evidence must be considered as substantial.[26]

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[18] In re: Kyle M., 27 P.3d at 805; *State v. Fulminate*, 193 Ariz. 485, 492-3, 975 P.2d 75, 82-83 (1999).
[19] *McGovern v. McGovern*, No. D-125189, 2001 WL 1198983, at 2(Ariz. App.Div.2 Oct. 11, 2001); *Ramirez v. Health PaR.T.ners of Southern Arizona*, 193 Ariz. 325, 330-31, 972 P.2d 658, 663-64 (App.1998).
[20] State v. Guerra, 161 Ariz. 289, 778 P.2d 1185 (1989); State v. Mincey, 141 Ariz. 425, 687 P.2d 1180, ceR.T..denied, 469 U.S. 1040, 105 S.Ct. 521, 83 L.Ed.2d 409 (1984); State v.Brown, 125 Ariz. 160, 608 P.2d 299 (1980); *Hollis v.* Industrial Commission, 94 Ariz. 113, 382 P.2d 226 (1963).
[21] *State v. Guerra*, supra; *State v. Tison*, 129 Ariz. 546, 633 P.2d 355 (1981), ceR.T..denied, 459 U.S. 882, 103 S.Ct. 180, 74 L.Ed.2d 147 (1982).
[22] *State v. Guerra*, supra; *State v. Girdler*, 138 Ariz. 482, 675 P.2d 1301 (1983), ceR.T..denied, 467 U.S. 1244, 104 S.Ct. 3519, 82 L.Ed.2d 826 (1984).
[23] In re: Estate of Shumway, 197 Ariz. 57, 3 P.3rd 977, review granted in paR.T., opinion vacated in paR.T. 9 P.3rd 1062; *Ryder v. Leach*, 3 Ariz. 129, 77P. 490 (1889).
[24] Hutcherson v. City of Phoenix, 192 Ariz. 51, 961 P.2d 449 (1998); State v. Guerra, supra; State ex rel. Herman v. Schaffer, 110 Ariz. 91, 515 P.2d 593 (1973).
[25] Tison, 129 Ariz. at 546.
[26] Id. at 553, 633 P.2d at 362.

**3. Michelle Richter's testimony**

The Appellant argues that pursuant to A.R.S. Section 32-3283 and Arizona Rules of Evidence 501 it was an error to admit the testimony of Michele Richter. A.R.S. Section 32-3283 provides in pertinent part that:

> In any legal action a certified behavioral health professional shall not, without the consent of his client be examined as to any communication made by the client to him or as to any such knowledge obtained with respect to personnel dealing with the client. Unless the client has waived the…privilege in writing or in court testimony, a behavioral health professional shall not be required to divulge to the board any information it subpoenas in connection with an investigation, public hearing or other proceeding.

Arizona Rules of Evidence 501 provides that privilege applies to protect certain statements/information within the context of certain relationships that includes the behavioral health professional-client privilege.

Here, the Appellant argues that under Section 32-3283, Ms. Richter is a certified behavioral health professional and Appellant is clearly the client. The State agrees with the statement, however, the State argues that the client waived this privilege when he discussed the communications he made to Ms. Richter with Detective Lines. Therefore, because both parties agree that there is a privilege, the issue becomes did the client waive his privilege when Detective Lines questioned him?

The evidence in this case indicates a finding by the trial judge that Appellant waived his privilege with Michelle Richter by admitting to Detective Lines that he had made the statements to Michelle Richter threatening to kill his wife, her boyfriend, and his wife's father. The trial judge found:

> One other thing that I'd like to state about the privileged communication is that can also be viewed as being waived when the communication occurs between a person and the health care professional, but the person chooses to tell another third party. So it can also be a waiver of the privileged communication. And it did happen in this case, because it was also (indicated) that he (Appellant) told Officer Lines the

same privileged communication he told the health care provider.[27]

The trial judge's conclusion appears to be supported by the record. This Court has compared the testimony of Michelle Richter and Detective Lines, and it clearly appears that Michelle Richter testified only about privileged matters (the threats) that Appellant admitted to Detective Lines. There is a clear waiver by Appellant's admission to Detective Lines, a third party, of any health professional-client privilege.

4. **Miranda warning**

The thrust of Appellant's Motion to Suppress was that he was in custody at the time he was interviewed by Detective Lines and that therefore, his statements were obtained in violation of the principles of Miranda v. Arizona[28], and were thus inadmissible. The Appellant argues that the trial judge erred by admitting statements Appellant allegedly made in violation of Appellant's Miranda Rights.

Police officers are required to give the Miranda warnings when a suspect is in custody and is interrogated while in custody.[29] The Fifth Amendment to the US Constitution provides that persons have a constitutional privilege to be free from self-incrimination.[30] The U.S. Supreme Court holding in Miranda, prohibits the use of statements stemming from the custodial interrogation of a defendant unless the prosecution demonstrates the use of procedural safeguards effective to secure the defendant's privilege against self-incrimination. A person is in custody for *Miranda* purposes when there is a formal arrest or a restraint on his or her freedom of movement of the degree associated with such an arrest.[31]

A determination regarding whether or not a person has been seized, in a constitutional sense, is a question of fact. The determination of custody arises from the totality of the circumstances. The initial determination of custody depends on the objective circumstances of the interrogation, not on the subjective views harbored by either interrogating officers or the person being questioned. Certain factors are generally relevant to the analysis of custody, including whether an individual is the focus of an investigation and his or her awareness of this fact, the place of an interrogation, and the length of the interrogation.[32]

Factors relevant to the analysis of custody include (1) whether the suspect was informed at the time of questioning that the questioning was voluntary, that the suspect was free to leave or

[27] R.T. of June 19, 2002, at 102-03.
[28] Miranda v. Arizona, 384 U.S. 436.
[29] Miranda v. Arizona, supra; State v. Landrum, 112 Ariz. 555, 544 P.2d 664(1976).
[30] United States Constitution and art. 2, § 10 of the Arizona Constitution.

[31] State v. Bainch, 109 Ariz. 77, 505 P.2d 248 (1973),
[32] State v. Fulminate, 161 Ariz 237, 778 P.2d 602 (1988).

request the officers to do so, or that the suspect was not considered under arrest; (2) whether the suspect possessed unrestrained freedom of movement during questioning; (3) whether the suspect initiated contact with authorities or voluntarily acquiesced to official requests to respond to questions; (4) whether strong arm tactics or deceptive stratagems were employed during questioning; (5) whether the atmosphere of the questioning was police dominated; or (6) whether the suspect was placed under arrest at the termination of the questioning. The presence of the first three factors tends to defeat the existence of custody, and the presence of the last three factors tends to establish custody for purposes of custodial interrogation.[33] Here, the first three factors are present, and therefore, there was no showing of custodial interrogation.

Furthermore, any interview by police officers of one suspected of a crime by a police officer will have coercive aspects to it, simply by virtue of the fact that the police officer is part of a law enforcement system, which may ultimately cause the suspect to be charged with a crime. **But police officers are not required to administer *Miranda* warnings to everyone whom they question.** Nor is the requirement of warnings to be imposed simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect. An individual is not subjected to custodial interrogation simply because he or she is questioned at the police station. Therefore, if an individual is not subjected to custodial interrogation because they are being questioned in a police station, an environment many would consider coercive, then it follows that the questioning in a mental facility should be given the same privilege.

Despite Appellant's claims that he was sitting in a room in mental facility, on medication, and the door was locked (no indication that the police requested or if this is just hospital policy) he was not free to leave and there was no attorney present. Therefore, the Appellant argues, under the totality of the circumstances he was in custody. The Appellant further adds that he could not imagine a more coercive situation than the police interrogating a mental patient in a mental institution.

In the instant case, there was nothing hindering the Appellant from leaving the room of his own volition. The undeniable fact that this was a mental institution does not automatically imply custodial interrogation. The Appellant was free to leave the room, despite whether he was free to leave the facility. Clearly, there was no coercion and the Appellant statements were voluntary based on free choice. As a result, Miranda warnings were not required.

## 5. Overbreadth of A.R.S. Section 13-1201(A)(1)

Appellant argues that A.R.S. § 13-1201 is unconstitutionally overbroad. A statute is overbroad when its language, given its normal meaning, is so broad that sanctions may apply to

[33] Id.

conduct which the state is not entitled to regulate.[34] Appellant claims that the statute is overbroad because the mentally ill have a right to speak freely to caregivers without fear of criminal prosecution and a statute that allows prosecution of that speech is constitutionally overbroad. However, Appellant has not cited to any authority for such a premise.

The State can and does criminalize speech that is meant to threaten and intimidate others. A.R.S. Section 13-1202 is unambiguous and is not overbroad and the Appellant's claim is without merit.

**6. Was there insufficient evidence to convict Appellant under A.R.S. 13-1202(A)(1) of threatening and intimidating?**

Appellant argues that there was no new threat on February 22, when he stated to Heather Carter on the telephone that the plan was to kill her. Appellant argues that he was not making a new threat, but was simply referring to a past event. Appellant also argues that he is entitled to a favorable inference by the court.[35]

Based on a reasonable standard of review, the appellate court must not reweigh the sufficiency of the evidence to determine if it would reach the same conclusion.[36] When the Appellant called Heather Carter and stated, "that's the plan" when asked whether he was planning on killing her, this constituted a new threat and the lower court found there was substantial evidence and we sustain that finding.

**7. Was there sufficient evidence to convict Appellant on the interference with judicial proceedings charge?**

Appellant argues that A.R.S. 13-2810(A)(2) requires that the Appellant knowingly disobey a court order. Appellant argues that under State v. Griltz[27] the State must prove that Appellant is sane if there was evidence raised as to the reasonable doubt of Appellant's sanity. As a result, the Appellant argues that he could not act knowingly because the facts presume to preclude a finding "knowingly", because he was in a mental institution. on medication, and under psychiatric care. The Appellant further claims that the state must prove he was sane and therefore acted knowingly. The Appellant also argues that the State provided no independent evidence that the Appellant had the capacity to knowingly disobey the Court's order. Therefore, absent such evidence the lower court's decision should be reversed.

[34] State v. Thompson, 138 Ariz. 341, 345, 674 P.2d 895, 899 (Ariz. App. 1984).
[35] Appellant's Memo p. 9
[36] See Standard of Review, part. 2 of this opinion.
[27] State v. Grilz, 666 P.2d 1059, 136 Ariz. 450 (1983).

I disagree. A.R.S. Section 13-502 ( C) put the burden of proving the Appellant's insanity on the Appellant. The Appellant shall prove his "legal insanity by clear and convincing evidence."[28] The Appellant has failed to do so.

The state, however, must prove that the Appellant knowingly disobeyed a court order. "Knowingly" is defined in A.R.S. Section 13-305(9)(b) to mean:

> With respect to conduct or to a circumstance described by a statute defining an offense, that a person is aware or believes that his conduct is of that nature or that that the circumstances exist. It does not require any knowledge of the unlawfulness of the act or omission.

Here, the Appellant knew that there was a court order prohibiting him from contacting Heather Carter, acknowledging to her that he was aware of the order and that "some rules are meant to be broken."[29] Heather Carter testified that he sounded competent and knew what he was talking about on the phone.[30]

The Appellant later admitted to Detective Lines that he had called Heather Carter and that he knew by doing so he had violated a court order.[31] Detective Lines asked him if the drugs he was taking made him do these things and he replied that he called her because he wanted to. The drugs didn't make him do anything.[32]

Finally, there was no evidence presented that the Appellant's ability to reason and control his actions were in any way affected by the medication he was taking. The Appellant's argument that the state failed to meet its burden as to the "knowingly" requirement fails based on the information above. The Appellant knew he was making a phone call to Heather Carter and knew this was a violation of the court order by his words and actions. The trial court found beyond a reasonable doubt that Appellant knowingly violated a court order. This finding is clearly supported by the record.

## 8. Conclusion

The testimony of Michelle Richter was properly admitted as the Appellant waived his privilege by speaking with Detective Lines.

[28] A.R.S. Section 13-205( C).
[29] R.T. p. 153: 21-25.
[30] R.T. p. 152: 20-25
[31] R.T. p. 163:16-23.
[32] R.T. p. 164:4-8.

The statements and confessions made to Detective Lines were voluntary and non custodial. Additionally, the Appellant knowingly violated the order of protection and made a new threat to Heather Carter.

For all of the reasons explained in this Court's opinion, this Court finds the A.R.S. Section 13-1201 to be constitutionally sound as applied by the Mesa City Court to Appellant. This Court further finds substantial evidence exists to support the conviction by the Mesa City Court.

IT IS THEREFORE ORDERED affirming the judgments of guilt and sentences imposed in each of these cases.

IT IS FURTHER ORDERED remanding these cases back to the Mesa City Court for all further and future proceedings in this case.